

# Delawyerizing Labor Arbitration

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## I. INTRODUCTION

Labor arbitration parties and labor arbitrators tend to accept with resignation the wide gap that often separates the simplicity of an arbitration issue and the complexity of the hearing employed to resolve it.<sup>1</sup> This Article acknowledges labor arbitration's excessive legalism and proposes a solution through mutually adoptable rules for the governance of all but the most complex labor arbitration proceedings.<sup>2</sup> The objectives of the proposed rules of evidence for labor arbitration hearings (see Appendix for proposed rules) are to shorten arbitration hearing time, to make the labor arbitration forum more accessible to nonlawyer advocates, and to increase hearing-stage rates of settlement. The objectives would be achieved by abolishing all objections to documentary evidence and all objections to testimony, except relevancy and privilege objections. For the disallowed objections, the proposed rules substitute post-evidence comments on the evidence.

## II. LABOR ARBITRATION AND THE ASSUMPTION OF FORMALISM

Somewhat paradoxically, arbitration of disputes over the meaning of collective bargaining agreements was rationally conceived—and is still thought of—as a judicial-free substitute for strikes over worker grievances. The formation of a nonjudicial procedure for resolving grievances without strikes had a sound historical and practical basis. First, nineteenth and early twentieth century American courts were hostile to union interests.<sup>3</sup> Second, even if that had not been so, judges were unfamiliar with the subjects of disputes over the meaning of collective bargaining agreements. The advent of large numbers of collective bargaining agreements created new and previously unheard of contractual terms. They had no counterparts in any statutory or contract law dealt with by American judges. That remains true today. Seniority, clean-up time, show-up time, holiday, vacation, and overtime pay clauses, for example, remain beyond the experience of the judiciary. Either statutes did not cover these conditions of employment, or they did not cover them as broadly as did the collective bargaining agreement. Nor has the common law developed in a way to include the subjects of labor agreements. Third, if judges had not been hostile to

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1. See Schmertz, *Evidentiary Considerations*, in *LABOR ARBITRATION DEVELOPMENT: A HANDBOOK* 78 (1983). The author describes "creeping legalism" as "a euphemism for keeping lawyers out." *Id.* See *Arbitration System Beset with Problems, Witnesses Tell Presidential Committee*, 93 Daily Lab. Rep. (BNA) A-10 (May 14, 1986), noting labor arbitration's increasing "formality, higher costs, longer delays, and fewer acceptable arbitrators." *Id.* A subcommittee report noted a survey of members of the National Academy of Arbitrators who concluded that "arbitration hearings have become much more legalistic in the past decade and that the finality of awards is becoming threatened by judicial review." *Id.* at A-11.

2. See Appendix for Proposed Rules of Evidence for Labor Arbitration Hearings. Unless otherwise indicated, "arbitration," as used in this Article, means "labor arbitration." For commentary on the rules of evidence in commercial arbitration cases, see Roth, *When to Ignore the Rules of Evidence in Arbitration*, 9 LITIGATION 20 (Winter 1983).

3. See, e.g., Magruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining*, 50 HARV. L. REV. 1071 (1937).

unionism and had been familiar with the kinds of disputes intended for labor arbitration, courts would have operated too slowly to prevent grievance disputes from festering, thus endangering the collective bargaining relationship.<sup>4</sup>

From the time of its ascendancy as the nearly exclusive means of resolving disputes over the meaning of collective bargaining agreements, labor arbitration has been portrayed as a simple and expeditious procedure. Grievance hearings were to be swiftly reached and swiftly conducted; nonlawyer representation for both sides was to be the rule rather than the exception.<sup>5</sup> An arbitration hearing conducted in the late 1940s, for example, was described as follows:

In the case under discussion the hearing was held at a hotel. It was very informal. The Union was represented by one of its national officials, the local shop chairman, the member of the shop committee in whose department the grievance occurred, and the workers concerned. Management was represented by one of the officials of the Association, several representatives of the company, and the superintendent of the department in which the problem arose. The Impartial Chairman opened the hearing by reading the letter sent to him by the party filing the case. Then he followed the customary procedure of permitting the party which had filed for the hearing . . . to present its case without interruption except from the Impartial Chairman, who asked questions from time to time. When the Federation had finished, the Association was given an opportunity to present its case without interruption. . . . [T]here followed then a period during which either side could ask questions or refute material presented by the other side. . . . [T]he parties exhibited real respect for each other. No stenographic record was taken at the hearing. This tended to keep it informal and the parties, including the workers who were involved, felt free to express themselves. . . .<sup>6</sup>

Over a period of time, and by increments, the valid arbitration objectives of speed and informality slipped away from view. Creeping formalism took sway with the commonly held notion that representation by a lawyer in an adversary proceeding, even a labor arbitration hearing, enhances the possibility of a successful outcome. Then came the inevitable inclination to match the opposition's lawyer with one's own lawyer.<sup>7</sup> With lawyers representing both arbitration parties and lawyers selecting the labor arbitrators, the rise of the lawyer arbitrator naturally followed.<sup>8</sup> The tri-lawyer arrangement inevitably fostered the development of procedure and evidence rules with which lawyers felt comfortable.<sup>9</sup> Objections to testimony and documents

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4. The U.S. Supreme Court has recently acknowledged the importance of speed as an essential component of the effort to substitute grievance-arbitration for strikes over grievances. See *United Paperworkers Int'l Union v. Misco, Inc.*, 108 S. Ct. 364, 371 (1987).

5. See T. KENNEDY, *EFFECTIVE LABOR ARBITRATION* (1948).

6. *Id.* at 49-50.

7. See Raffaele, *Lawyers in Labor Arbitration*, 37 *ARB. J.*, Sept. 1982, at 14-23.

8. More than half of the 55,000 members of the American Arbitration Association's National Panel of Arbitrators are attorneys. AMERICAN ARBITRATION ASSOCIATION, *THE LAWYER AND ARBITRATION* 8 (1986). The pamphlet does not provide a breakdown of labor and commercial arbitration panel members.

9. A typical first-year law school curriculum includes a required course on civil procedure. That course sometimes focuses on a single set of procedural rules, like the Federal Rules of Civil Procedure. See, e.g., J. COUND, J. FRIEDENTHAL, A. MILLER & J. SEXTON, *CASES AND MATERIALS ON CIVIL PROCEDURE* (4th ed. 1985 & Supp. 1987), a popular civil procedure case book used in many first-year law courses. Though generally not a required course in law school, evidence is a course that also dominates law school curricula. Evidence is essential to those interested in litigation and, like civil procedure, is a certain bar examination subject in most jurisdictions. The civil procedure course is now seen by some academicians as a vehicle through which major reforms in law teaching might be achieved, particularly the growing

gradually became part and parcel of the labor-arbitration hearing.<sup>10</sup> Today, except for the absence of a high bench, oak-panelled walls, and an enrobed judge, a casual and short-term observer may fail to distinguish between a one-day labor arbitration contesting a one-day suspension from work and the trial of an antitrust case in federal district court.<sup>11</sup> Unwarranted delay is now encountered at all stages of the arbitration phase of grievance arbitration: the time required to establish the arbitration date,<sup>12</sup> to

attempt to link traditional law classroom work with legal clinical experience. See generally Carrington, *Civil Procedure and Alternative Dispute Resolution*, 34 J. LEGAL EDUC. 298 (1984); Minow, *Some Thoughts on Dispute Resolution and Civil Procedure*, 34 J. LEGAL EDUC. 284 (1984); Schneider, *Rethinking the Teaching of Civil Procedure*, 37 J. LEGAL EDUC. 41 (1987). Federal judges are bound by the Federal Rules of Evidence, FED. R. EVID. 101, and those rules are now the foundation from which many law school evidence courses are taught. E.g., L. LETWIN, *EVIDENCE LAW: COMMENTARY, PROBLEMS AND CASES* (1986); C. MUELLER & L. KIRKPATRICK, *EVIDENCE UNDER THE RULES* (1988); P. RICE, *EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE* (1987). Twenty-eight states have adopted codes based on the Federal Rules of Evidence. See C. MUELLER & L. KIRKPATRICK, *supra*, at 3 n.2, listing the states.

10. See Aaron, *Some Procedural Problems In Arbitration*, 10 VAND. L. REV. 733 (1957). "Familiarity with established rules of conduct, however archaic and nonsensical they may be, apparently does not breed contempt; on the contrary, it seems to enhance the average lawyer's feelings of security and self-confidence." *Id.* In the article, Professor Aaron's laudable objective was to "suggest ways in which the general practitioner can, through a better understanding of arbitration procedures, enhance his own usefulness as a participant." *Id.* This Article accepts Professor Aaron's premise of lawyer discomfort with the informalities of labor arbitration. Without disagreeing with his premises, this Article arrives at different conclusions concerning arbitral formalism. For the reasons that prompted Professor Aaron's effort to enhance lawyers' understanding of arbitration procedures, this Article attempts to encourage the participation of nonlawyers in the labor arbitration forum by means of a procedural shift to a lower level of formalism.

11. Somewhat ironically, as labor arbitration levels of formality are on the increase, new uses of arbitration, outside the labor arbitration context, appear to be sensitive to the issue of formality and tend to encourage informality. See, for example, comments on proposed rules and regulations of the Pension Benefit Guaranty Corporation, setting up rules and procedures for the arbitration of disputes over employer withdrawal liability under the Employee Retirement Income Security Act of 1974, 50 Fed. Reg. 34679-701 (1985) (to be codified at 29 C.F.R. pts. 2640 & 2641). See also comments on interim rules of the Merit Systems Protection Board for new "appeals arbitration procedure for matters subject to the appellate jurisdiction of the Board." 48 Fed. Reg. 11399-401 (1983) (to be codified at 5 C.F.R. pt. 1201).

12. Federal Mediation & Conciliation Service (FMCS) Annual Reports provide the annual average elapsed time in days and percent and change in elapsed time per case for arbitration proceedings involving selection of the arbitrator through FMCS procedures. FMCS closes between 5,000 and 8,000 arbitration cases per year according to FMCS Annual Reports for the years 1976 through 1985. See FMCS ANN. REP., 1976-1985 table 21. For the years 1981 through 1985, the relevant time frames were as follows:

Average elapsed time in days per case for FMCS closed arbitration award cases sampled  
in fiscal year 1981 through 1986

Sequence of Events	1981	1982	1983	1984	1985	1986
TOTAL	230.26	292.15	335.39	322.48	377.08	315.01
PRE-HEARING PHASE	196.70	253.02	292.70	276.38	332.08	279.70
Between grievance filing and request for panel	79.22	99.95	100.76	94.50	108.95	100.20
Between panel request date and panel sent	5.13	6.43	5.87	4.35	5.80	6.69
Between date panel sent and appointment of arbitrator	41.73	59.61	76.64	69.89	96.77	73.49
Between date of appointment & date of hearing	70.62	87.03	109.43	107.64	120.56	99.32
POST-HEARING PHASE						
Between hearing date and date award rendered by arbitrator	33.56	39.13	42.69	46.10	45.00	35.31

FMCS ANN. REP. 23, table 5 (1986).

complete the arbitration hearing,<sup>13</sup> to write post-hearing briefs, and to receive the arbitrator's decision.<sup>14</sup> Growing lawyer involvement in labor arbitration hearings, itself a manifestation of formalism, means the scheduling of arbitration hearings often hinges on lawyers' availability and the time required by lawyers to learn what party representatives involved in handling the grievance already know.

Part of labor arbitration's delays at the hearing stage of the proceedings is attributable to needless evidence-rule complexities. The proposition that rules of evidence are generally not applicable in labor arbitration proceedings<sup>15</sup> is usually honored in the breach, even though the governing rules, for example, of the American Arbitration Association permit labor arbitration parties to "offer such evidence as they desire and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute."<sup>16</sup> Consequently, simple-issue labor arbitration hearings are generally dominated by the full range of reliance on rules of evidence normally required in judicial trials. Labor arbitration participants who are not familiar with courtroom rules of evidence are now encouraged to learn them in arbitration training programs featuring topics like hearsay and exclusionary rules, the use of presumptions, judicial notice, the best evidence rule, new or surprise evidence, medical evidence and past records of an employee in a discipline case. Published works on evidence in labor arbitration proceedings assume that the reader seeks knowledge about the full range of evidence rules generally applicable in judicial proceedings.<sup>17</sup> At the same time, the existence of literature on how to apply courtroom rules of evidence in labor arbitration

13. *Id.* The time to complete an arbitration hearing is still short when compared with the time required to complete civil judicial trials, but only because labor arbitration issues are less complex. Some arbitration hearings can be excessively lengthy in proportion to the degree of complexity of the issue or issues involved. No hard data supports this conclusion. It is based on the author's participation in numerous arbitration hearings and countless conversations with other arbitrators on the subject. It also follows that the formal rules of procedure and evidence used in the labor arbitration forum are inevitably bound to generate longer hearing time. By this criterion, an arbitration hearing that should take a single day is excessively lengthy if it takes two or three days to complete.

14. See *supra* notes 9-10.

15. The American Arbitration Association's (AAA) Commercial Arbitration Rules, as well as its Labor Arbitration Rules, provide that "conformity to legal rules of evidence shall not be necessary." AAA COMM. ARB. R. 31. The AAA Commercial Arbitration Rules are listed in the appendices of several texts on commercial arbitration. *E.g.*, R. RODMAN, *COMMERCIAL ARBITRATION WITH FORMS* 632 app. A (1984); G. WILNER, *DOMKE ON COMMERCIAL ARBITRATION* 43 app. VII (rev. ed. 1988). New American Arbitration Association rules for special commercial disputes cover securities and title insurance disputes. See AMERICAN ARBITRATION ASSOCIATION, *ARBITRATION AND THE LAW*, 1987-88, at 315-28 (security rules), 329-42 (title insurance rules) (1988). Rule 31 in the securities rules and rule 30 in the title insurance rules are the same as rule 31 in the general commercial arbitration rules. See R. FLEMING, *THE LABOR ARBITRATION PROCESS* 165 (1965), noting that the rules of evidence "were developed in connection with jury trials, and do not apply strictly in any tribunal but a jury-court." (citing 1 WIGMORE ON EVIDENCE § 4, at 27 (3d ed. 1940)).

16. Rule 28 of the Voluntary Labor Arbitration Rules of the American Arbitration Association (as amended and in effect January 1, 1984). The rule also provides that "conformity to legal rules of evidence shall not be necessary." See R. COULSON, *LABOR ARBITRATION—WHAT YOU NEED TO KNOW* 96 (1973). Rule 28 thus leaves it open to the parties to make their arbitration hearing format as informal as they desire.

17. See generally M. HILL & A. SINICROPI, *EVIDENCE IN ARBITRATION* (1980); E. LEVIN & D. GRODY, *WITNESSES IN ARBITRATION: SELECTION, PREPARATION, AND PRESENTATION* (1987); M. SCHEINMAN, *EVIDENCE AND PROOF IN ARBITRATION* (1977). On WITNESSES IN ARBITRATION, the Daily Labor Report comments, "Witness in Arbitration discusses the psychology of testimony, how to examine witnesses, and what constitutes objectionable and inadmissible testimony. . . . It also features the complex texts of the Federal Rules of Evidence and the Rules of the American Arbitration Association." 69 Daily Lab. Rep. (BNA) A-13 (1987). See also F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 296-341 (4th ed. 1985); Bornstein & Golick, *Evidence in Arbitration*, in *LABOR AND EMPLOYMENT ARBITRATION* §§ 5.01-5.11 (Bornstein & Gosline eds. 1988).

proceedings conveys the impression that technical rules of evidence are indeed applicable in labor arbitration proceedings, despite the often-stated disclaimer to the contrary.

### III. GOVERNANCE OF LABOR ARBITRATION PROCEEDINGS UNDER THE PROPOSED RULES

The assumption that formalism is essential in labor arbitration proceedings is invalid to the extent of its across-the-board application to all kinds of arbitration hearings, without considering the complexity of the issues in dispute. Even as used in judicial trials, the rules of evidence are constantly under probe because of dormant suspicions that they are excessive and, in many instances, of doubtful utility.<sup>18</sup> A prime example of needless and counterproductive formalism in labor arbitration is the protracted argument over the admissibility of a document and the nature of a question to a witness. The commonly used objections are lack of a proper foundation, hearsay, irrelevancy, and "not the best evidence." The proposed rules substitute closing-argument comments, including arguments that certain documents should be given little or no weight, for objections to documentary evidence. All objections to testimony are eliminated except those based on relevance and the rarely invoked (in labor arbitration) privilege objections: self-incrimination, husband-wife, doctor-patient, priest-penitent, and attorney-client privilege.<sup>19</sup>

#### A. *Objections to Documents*

Evidence in judicial trials is rejected for three basic reasons: the evidence has no bearing on the court's or jury's ability to decide the case and is therefore objectionable on relevancy grounds;<sup>20</sup> evidence is unreliable and would confuse or mislead the jury if considered;<sup>21</sup> evidence is prejudicial, in that it would needlessly inflame the jury and unfairly sway it in favor of the opposing party.<sup>22</sup> Juries are regarded as being more susceptible to prejudicial and misleading evidence than is a trial judge who functions every day as a trained listener and analyzer of evidence. As a result, testimony and documentary evidence that a jury is not permitted to hear or see, a judge, in a similar but nonjury trial, would be permitted to hear or see.<sup>23</sup> It

18. See Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L. F. 230.

19. Like the Federal Rules of Evidence, the proposed rules retain privilege objections because of the unquestionably valid policy basis on which the rules are grounded. See 1 WIGMORE ON EVIDENCE §§ 1-4(c) (Tillers rev. ed. 1983). Rule 501 of the Federal Rules of Evidence retains federal and state common law privilege doctrine.

20. See FED. R. EVID. 401.

21. See, for example, Federal Rules of Evidence Rule 403, which provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

22. *Id.* See *Brandon v. United States*, 431 F.2d 1391 (7th Cir. 1970), *cert. denied*, 400 U.S. 1022, *reh'g denied*, 401 U.S. 950, *cert. denied*, 401 U.S. 942 (1971). A trial judge has wide discretion in this area. See *United States v. Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970); *Jamison v. Storer Broadcasting Co.*, 511 F. Supp. 1286 (E.D. Mich. 1981). Blood-stained clothing of the murder victim, not linked in any way with the defendant, can increase the jury's anger that the crime was committed, but without properly shedding light on the question of whether the defendant committed the crime. That evidence is excluded rather than risk confusion of the juries' anger over the fact that a crime was committed with evidence that the accused committed the crime. The evidence would, however, be admitted if the blood-stained clothing of the victim were found in the defendant's basement.

23. See, e.g., *Goodman v. Highlands Ins. Co.*, 607 F.2d 665, 668 (5th Cir. 1979). "We have frequently stated

should likewise follow that arbitrators are not likely to be prejudiced or materially distracted by their familiarity with a document placed in the exhibit file, argued about at the close of evidence, and ultimately determined to have little or no probative value.

Under the proposed rules, neither party would be certain how the arbitrator would weigh certain evidence. However, that is true under current practice, as evidenced by the somewhat meaningless pronouncement of some arbitrators that "the document will be received for what it's worth."<sup>24</sup> Under current arbitration practice, documents offered but not received in evidence are sometimes unavoidably and indelibly fixed in the arbitrator's mind during decision-writing; further, documents received in evidence are sometimes given little or no weight by the arbitrator.

Many objections are made outside the context of the full picture later revealed by the completion of all evidence. What may appear to be a critical ground for objection to a document during the presentation of evidence, will often be seen, with hindsight, as presenting no ground for objection when all evidence has been presented. Indeed, some objections are made to evidence that is later determined to be useful to the objecting party. Under the proposed rules, a party would not be prompted to make matters of that kind the subject of post-testimony comments on the evidence.

Post-testimony comments on evidence would not lead to a document's rejection as evidence, but the arbitrator, as a result of the comments, could become convinced that certain documents in the exhibit file should be given little or zero weight. The comment phase of the hearing would not become a protracted contest over admissibility. Rather, in response to comments on the evidence, the arbitrator would later decide, on the basis of evaluating the evidence and the comments on it, the extent to which the evidence should be taken into account in reaching a decision. Comments on evidence could be made either as part of the closing argument ordinarily made when briefs are not filed or as part of written arguments in briefs.

Post-evidence arguments over opposing documents would be limited to comments on authenticity, relevance in the light of the evidence as a whole, and any other matter relating to the respect with which the arbitrator should view the evidence. Arguments based solely on the application of more formal and technical rules of evidence would not be favored.

## B. *Objections to Questions and Testimony*

Objections commonly made to opposing questions usually parallel those made to documentary evidence. Some objections, though, are made only to testimony, like objections to nonresponsive answers. Under the proposed rules, objections to

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that it is virtually impossible for a trial judge in a nonjury case to commit reversible error by receiving incompetent evidence." *Pritchard v. Downie*, 326 F.2d 323, 326 (8th Cir. 1964). "To the extent that the evidence may not be admissible under the shop-book exception, it is admitted pursuant to the residual discretion of a trial court in a non-jury case to admit into evidence hearsay found to be the best evidence reasonably available and to have assurance of accuracy and reliability." *Ark-Mo Farms, Inc. v. United States*, 530 F.2d 1384, 1386-87 (Ct. Cl. 1976).

24. N. BRAND, *LABOR ARBITRATION: THE STRATEGY OF PERSUASION* 123 (1987).

testimony would be allowed only on grounds of relevancy<sup>25</sup> and the rarely invoked but well-grounded reasons of common law, statutory, or constitutional privilege.<sup>26</sup> A relevancy objection would be sustained only if it were abundantly clear to the arbitrator that allowing the question and answer, or line of questions and answers, would not contribute to the arbitrator's understanding of the case. The purpose of this limitation on objections is to allow witnesses to testify more freely and expeditiously. Consequently, the limitation enhances the arbitrator's ability to follow and analyze testimony received in a less disjointed form.

With the obvious gains in efficiency and time, little would be lost by limiting question and testimony objections to matters plainly irrelevant. The nature of many objections is such that proper cross-examination by the objectors often accomplishes their objectives. Even the leading question, answered without objection, can effectively be dealt with through cross-examination and argument. Misleading testimony, conveyed through answers to leading questions on direct examination, can be portrayed as such through cross-examination. If no objections are made, leading questions on direct examination are bound to have an impact on the arbitrator, even without the leading nature of the question being commented upon during argument. An arbitrator need not have a wealth of experience to sense intuitively that the interrogator, rather than the witness, is testifying in response to leading questions. Skillful counsel will often not object to leading questions on direct examination, preferring instead to let the adverse impact of leading-question answers become imbedded in the mind of the decision-maker.<sup>27</sup> Once testimony has been concluded, the effects of leading-question answers can be highlighted during argument or briefs to the arbitrator.

Other exclusionary objections are even more amenable to resolution through effective cross-examination and argument. The "best-evidence" objection, for example, is not permitted under the proposed rules. Presently, a best-evidence objection is ordinarily sustained if evidence more reliable and authentic than the offered copy or summary evidence is available.<sup>28</sup> Under the proposed rules, the secondary nature of evidence can be brought out during cross-examination, post-testimony comments on the evidence, or both. The best-evidence objection is an example of an objection that is often made reflexively, without careful regard to whether the offered evidence is detrimental to the objector's case. It typifies the worst aspect of strict adversary proceedings: the objection is instinctively made because "the book" calls for it, or worse, made solely for the sake of interrupting the flow of the opposition's case.

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25. Generally, evidence may be excluded as irrelevant if it is not probative of the proposition it is offered to prove. See FED. R. EVID. 401; see also 22 C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE* § 5165 (1978).

26. See *supra* note 19.

27. See N. BRAND, *supra* note 24, at 161. "If your opponent had objected that your questions were leading, the objections would have been sustained. But a canny opponent will not make that objection. Rather she will let you lead your witness through the testimony and undercut your own case." *Id.* See also P. BERGMAN, *TRIAL ADVOCACY IN A NUTSHELL* 82-84 (1979).

28. See MCCORMICK ON EVIDENCE 802-03 (E. Cleary ed. 1972); see also M. HILL & A. SINICROPI, *supra* note 17, at 28-29. As Professors Hill and Sinicropi point out, the state of the copying art is now so advanced that the utility of the best-evidence rule, as originally applied to copies, is open to serious doubt. *Id.* at 29.

### C. *The Relevancy Exception*

The labor arbitration hearing ordinarily has three components, each of which parallels the format of a judicial trial: opening arguments by both parties, documentary and testimonial evidence, with cross-examination and rebuttal of evidentiary contentions by both parties, and closing oral arguments or posthearing briefs. An opening argument to the arbitrator serves the same function for the arbitrator as an opening statement to a jury in a judicial trial. It informs the arbitrator what each side intends to prove. It is an essential part of the labor arbitration hearing. Neither party should be permitted to waive it, for the failure to provide the arbitrator with an outline of what a party intends to prove affects the arbitrator's ability to rule on relevancy objections.

Under the current practice, many arbitrators are of the view that the therapeutic effect of arbitration will be lost unless parties are permitted to introduce into evidence anything they desire, whether relevant or irrelevant. Arbitration does have a valuable therapeutic effect,<sup>29</sup> which is derived from the opportunity to present a case on matters relevant to the grievance. However, the therapeutic attribute is carried too far when witnesses are allowed to say anything, no matter how irrelevant to the issues before the arbitrator.<sup>30</sup>

Terminating a hearing in the shortest time possible, consistent with the receipt of all essential evidence, should be a prime objective of the labor arbitrator. The "minimum-length hearing" format enhances the arbitrator's ability to resolve accurately all subsidiary and ultimate questions of fact. Irrelevant and distracting evidence can obstruct reasoned judgment by diverting intellectual energy resources away from the task of analyzing relevant evidence. The view that any and all evidence should be admitted in the name of party therapy is also objectionable for the compelling reason that arbitration is a private contractual arrangement under which the arbitrator is compensated for hearing and deciding a case. The longer the hearing, the greater the arbitrator's compensation. Proponents of therapy-arbitration may have good intentions, but their position carries a built-in appearance that the arbitrator is extending hearing time for purposes of obtaining extended compensation.

The response with seeming appeal is "consensuality": if parties want therapy-arbitration they are entitled to it; the arbitrator should not only accommodate them, but would be remiss in failing to do so. The problem with this response is that the consensuality argument can be used to justify some arguably dubious arbitration practices. As used to justify therapy-arbitration, it effectively discounts the leadership role arbitrators are often able to play in shaping party consensus. The mutual desire for therapy-arbitration can be quickly dampened by a firm ruling in favor of keeping

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29. See *infra* note 30.

30. See *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960), one of the Steelworkers' trilogy cases, holding that an employer may not resist arbitration on the sole ground that a grievance is frivolous: "The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware." *Id.* at 568. The therapy rationale for strictly enforcing the contractual obligation to arbitrate has no bearing on the question of what kind of evidence should be received in a labor arbitration hearing. The other trilogy cases are *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) and *United Steelworkers of Am. v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).



obviously irrelevant testimony out of the hearing. Practically, irrelevant testimony is of no use to the arbitrator in rendering a decision, and may be a distracting factor leading to an incorrect decision. Even when there is no objection on grounds of irrelevancy, a suggestion by the arbitrator that testimony appears not to be helpful in resolving the issues will invariably be accepted and prompt a shift to a new line of inquiry.

#### D. *Burden and Quantum of Proof*

It is standard practice in labor arbitration that the union has the burden of proof and the burden of going forward with the evidence in all matters except discipline cases.<sup>31</sup> The quantum of proof standard in cases not involving discipline is the civil trial standard of "preponderance of the evidence."<sup>32</sup> What is often disputed at arbitration hearings is the amount of proof required to satisfy the burden in discipline cases, particularly when criminal misconduct is alleged as the basis for discharge. There are wide-ranging views on what the quantum of proof should be in such cases: (1) the quantum of proof standard is the same, preponderance of the evidence, in all cases, including all discharge cases;<sup>33</sup> (2) the standard shifts to a stricter level, like proof beyond reasonable doubt,<sup>34</sup> or clear and convincing evidence,<sup>35</sup> in discharge cases involving allegations of criminal misconduct, but not in other kinds of discharge cases.<sup>36</sup>

The proposed rules eliminate all contests over quantum of proof in labor arbitration proceedings. They would establish a neutral-burden standard under which the proof required for a party to prevail is whatever evidence it takes to convince the arbitrator that the party with the burden of proof should prevail.<sup>37</sup> The proposed rules make no attempt to quantify the amount of evidence required for a party to prevail.

The neutral-burden rule is a quantum of proof rule, not an allocation of proof rule. The proposed rules retain the concept of allocating to the union the burden of proof and the burden of going forward with the evidence in all matters except discipline cases. The proposed rules are consistent with the present practice of leaving to the arbitrator's intuitive judgment the determination of whether the case presented by the party with the burden of proof ought to prevail.<sup>38</sup> They differ from practice by not requiring any quantification efforts.

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31. See F. ELKOURI & E. ELKOURI, *supra* note 17, at 661-63; M. HILL & A. SINICROPI, *supra* note 17, at 13.

32. *Id.*

33. See Aaron, *supra* note 10.

34. Great Atl. & Pac. Tea Co. v. NLRB, 354 F.2d 707 (5th Cir. 1966). See also Arbitration 1982 Conduct of the Hearing (BNA) 133-37 (discussion on burden of proof). As reported, the consensus of a panel of experienced arbitrators was that the quantum of proof should not shift to a higher standard in discipline cases involving allegations of criminal conduct.

35. Utility Trailer Mfg., 83 Lab. Arb. (BNA) 680 (1984) (Richman, Arb.).

36. Kroger Co., 25 Lab. Arb. (BNA) 906, 908 (1955) (Smith, Arb.).

37. A neutral-burden standard is used by the English Industrial Tribunals to resolve claims of unfair dismissal. See Mordsley & Wall, *The Dismissal of Employees Under the Unfair Dismissal Law in the United Kingdom and Labor Arbitration Proceedings in the United States: The Parameters of Reasonableness and Just Cause*, 16 CORNELL INT'L L.J. 1, 22-24, nn.82-92 (1983).

38. See Schmertz, *supra* note 1, at 86-87.

Arbitration formalists will protest on the grounds that parties are entitled to know what amount of evidence will be necessary to convince the arbitrator that a party should prevail.<sup>39</sup> They will argue that the neutral-burden rule will permit the arbitrator to weigh the evidence in any manner the arbitrator desires. Yet, that is similar to what arbitrators, judges, juries, and other decision-makers presently do in contested cases. They are consciously aware of which party has the burden of proof, but they have no fixed manner for determining the amount of evidence required to meet that burden. They weigh the evidence and, on reflection following oral or written argument, develop an indefinable sense of how a case tips.<sup>40</sup>

There are no descriptive units of measurement by which a weighing of the evidence quantification can be made. No one can say, for example, how "clear and convincing evidence," "proof beyond reasonable doubt," and "preponderance of the evidence" differ quantitatively. Arbitrators are aware that the "proof beyond reasonable doubt" standard requires more convincing proof than the "preponderance of the evidence" standard. However, when the standards are applied in individual cases, the measured extent to which they differ is unknown.

Judges who attempt to make such distinctions do no more than intuitively apply quantum of proof standards in complex nonjury judicial trials. In jury trials, juries are instructed on quantum of proof. In complex cases, however, it seems clear that the instructions are often beyond a jury's ability to comprehend.<sup>41</sup> As a response to the complexity of the judicial trial, rules on burden of proof have been structured in a manner that belies their inability to rise above the level of intuitive application. Judges are expected to apply the rules to the best of their ability, although their efforts often fall short of success.

The need for uniformity in the application of the law is another basis for the struggle to formulate workable burden of proof rules for judicial trials. Uniformity in the courts is accomplished in part through an active appellate review process. Small numbers of appellate judges review the work of numerous trial judges, thereby establishing principles of law that the trial judges are obligated to follow. In contrast, labor arbitration is by design a largely ad hoc procedure. There is little reliance on decision precedent by other arbitrators involving other parties. Labor contracts and

39. See P. HAYS, *LABOR ARBITRATION: A DISSENTING VIEW* (1966).

40. See Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" In Judicial Decision*, 14 CORNELL L.Q. 274 (1928) on "the power of intuitive decision."

41. For example, California jurors in civil cases are instructed on the burden of proof as follows:

The defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish:

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"Preponderance of the evidence" means evidence that has more convincing force than that opposed to it.

If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.

You should consider all of the evidence bearing upon every issue regardless of who produced it.

CIVIL: BOOK OF APPROVED JURY INSTRUCTIONS [BAJI] 45 (7th ed. 1986). See generally E. DEVITT, C. BLACKMAR & M. WOLFF, *FEDERAL JURY PRACTICE AND INSTRUCTION* (4th ed. 1987), an able but probably not successful attempt to make jury instructions in complex cases comprehensible to lay juries. See also AMERICAN BAR ASSOCIATION, *MODEL JURY INSTRUCTIONS FOR BUSINESS TORT LITIGATION* (1980); D. BURTON, *JURY INSTRUCTIONS IN INTELLECTUAL PROPERTY CASES* (Supp. 1987).

practices differ from industry to industry and even from employer to employer within the same industry, depending upon locale. The ad hoc nature of labor arbitration is evidenced by the tendency of arbitrators to ignore precedents not involving the same parties and contract clauses,<sup>42</sup> the tendency of the same parties to select different arbitrators for different grievances, and the uniformly followed contractual practice of making arbitrators' decisions "final and binding." The selection of different arbitrators for different arbitration cases is not consistent with a perceived need to promote uniformity in arbitral decision-making, even on the assumption that uniform arbitration results within a bargaining unit are desirable.

A uniformly applicable burden of proof standard would be nearly impossible to achieve given that arbitrators' views are in such conflict. For example, in discharge cases involving alleged criminal misconduct, most arbitrators follow the rule that the burden is on the company to prove its case "beyond reasonable doubt."<sup>43</sup> Proponents of that view are guided by what they perceive to be the serious consequences of a discharge for conduct in violation of the criminal law. It is argued that such discharges irreparably reduce the possibility of re-employment. The invalid assumption in support of this analysis is that employers freely provide other hiring employers with discharge information. The reality is that many employers provide other employers with no information about a former employee, other than the beginning and ending dates of the employment relationship.<sup>44</sup> Another invalid assumption is that all discharges for reasons amounting to criminal misconduct are more serious than discharges for noncriminal misconduct. A discharge for possession of a small amount of marijuana on company premises, however, is a less serious reason for discharge than a discharge for gross negligence in the operation of plant machinery that caused loss of life and extensive damage to company property. Illogically, the "beyond reasonable doubt" standard would apply to the marijuana possession case and the "preponderance of the evidence" standard would apply to the plant negligence case.

Some arbitrators apply the "preponderance of the evidence" rule in all discharge cases, without exception, on the ground that an arbitration proceeding is a civil and not a criminal proceeding.<sup>45</sup> The point here is not to make the case in favor of either rationale. The central point is the futility of attempting strictly to apply any of the quantum of proof rules. The existence of widely varying rationales in support of conflicting rules is not a basis by itself for rejecting debate aimed at resolution of the conflict. The near impossibility of functionally applying either of the rules or of making practical distinctions among them, combined with the existence of varying rationales on quantum of proof, is a reason for eliminating arguments over which

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42. In arbitration proceedings, *res judicata* is generally held to be applicable to arbitration decisions involving the same parties, the same contract language, and the same issues. See M. HILL & A. SINICROP, *supra* note 17.

43. Kroger Co., 25 Lab. Arb. (BNA) 906 (1955) (Smith, Arb.).

44. Employers have been held liable for defamation for providing incorrect and damaging information to employers making inquiries about former employees. See *Agarwal v. Johnson*, 25 Cal. 3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979). The reluctance to provide any information about a former employee is no doubt triggered in part by a possibility of liability in such actions.

45. See *Southern Cal. Gas Co.*, 89 Lab. Arb. (BNA) 393, 396 (1987) (Alleyne, Arb.).

quantum of proof rules apply in labor arbitration hearings. Instead, the quantum of proof standard used in all labor arbitration cases should be one that assures an arbitrator's adequate intuitive response to the question: "Has the party with the burden of proof persuaded me that my award should be in its favor?"

### E. *Controlling Witnesses*

The proposed rules of evidence for labor arbitration hearings permit parties to call any witness whose testimony they consider relevant and in any order desired during the presentation of a party's case. The rule eliminates contests over objections to adverse witnesses, including the grievant, and all objections based on the witness's lack of first-hand knowledge of relevant events. Calling adverse witnesses is currently a common practice in civil litigation, where it is uniformly allowed.<sup>46</sup> Yet, what should an arbitrator do when the employer calls the grievant as its first witness in a discipline case and the union objects? The question does not arise frequently. When it does arise, or when it is discussed in the abstract, it draws intense argument.<sup>47</sup>

Because the employer has the burden of proof and the burden of going forward in discipline cases, the grievant is an adverse witness when called by the employer during presentation of its case. In this instance, the caller then has the possible advantages of surprise and the opportunity to cross-examine without waiting for the union to conduct a direct examination of the grievant as part of the union's case.<sup>48</sup> When the attempt is made by the employer, the objecting union will argue that the employer must satisfy its obligation of going forward with the evidence by first presenting its own witnesses and other evidence; it should not be allowed to begin its case by calling a "union witness" as its witness. The argument may also include objections based on self-incrimination theories. These arguments are incorrect given that the self-incrimination privilege must be personally invoked after the invoker takes the stand and not before.<sup>49</sup> The better practice is to allow each party to conduct its case in the order in which it chooses and to call any witness a party deems essential to its case. The argument that calling the grievant as an adverse witness in a discipline case shifts the settled order of presentation from the employer to the union incorrectly

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46. For example, rule 611(c) of the Federal Rules of Evidence permits a party to call "a hostile witness, an adverse party, or a witness identified with an adverse party." The Federal Rules of Evidence were adopted in 1975, but long before their adoption, the Federal Rules of Civil Procedure permitted a party to call an adverse witness. The authorizing rule 43(b) was abrogated, effective July 1, 1975, but only for the reason that rule 43(b) was no longer "needed or appropriate since the matters with which it deals are treated in the [Federal] Rules of Evidence." 28 U.S.C.A. (Supp. 1988) (Notes of Advisory Committee on Rules).

47. See Aaron, *The Role of the Arbitrator In Ensuring A Fair Hearing*, in *Arbitration 1982 Conduct of the Hearing* (BNA) 30, 35, reporting a "wide range of arbitral opinion on this question." *Id.* at 35-37. The range of opinion on the issue was also represented by commentators on the remarks of Professor Aaron. *Id.* at 49-67.

48. Rule 611(c) of the Federal Rules of Evidence provides in part: "When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions."

49. See *Moran v. Burbine*, 475 U.S. 412, 433 n.4 (1986) (superseded by statute as stated in *People v. Ledesma*, 204 Cal. App. 3d 682, 251 Cal. Rptr. 417 (1988)); *Rakas v. Illinois*, 439 U.S. 128, 133, 140 n.8 (1978), *reh'g denied*, 439 U.S. 1122 (1979); *Rogers v. United States*, 340 U.S. 367, 370-71, *reh'g denied*, 341 U.S. 912 (1951).

assumes that the adverse witness is not a part of the employer's case. In fact, the adverse-witness grievant may be a very essential part of the employer's case.

The "fairness" argument in opposition to the practice of the employer calling the grievant as a witness contains another invalid assumption: the grievant will always be disadvantaged by virtue of having been called as an adverse witness. Actually, calling any adverse witness presents great risks to the caller. As a management attorney has noted:

The issue as to whether a grievant should be called as the employer's first witness, or as any witness for the employer, is not a concern of mine, since I view such activity to be unnecessarily abrasive and foolhardy. It has not been my experience that witnesses who are hostile to your point of view provide helpful or predictable testimony for your case.<sup>50</sup>

Matching the advantages of surprise and the ability to cross-examine at the outset of the examination are the disadvantages of not having gone over testimony with the adverse-witness grievant. Consequently, there is a high probability of receiving damaging responsive answers.

#### IV. SUMMARY AND CONCLUSIONS

The position advanced here is favored by the relatively simple nature of most labor arbitration proceedings, for the degree of simplicity in an adversary proceeding is partly a function of its length. Routine criminal and antitrust litigation can extend for several weeks. In fact, a complex antitrust trial can extend for months or years. The average duration of a labor arbitration case, however, is one day.<sup>51</sup>

In addition, the recommended informal hearing mode more readily lends itself to hearing-stage settlements. It does so while preserving the often essential advantages of an adversary hearing. It is distinguishable from a pure mediative effort, the success of which hinges entirely on the willingness of the disputing parties mutually to agree on the outcome. The proposed rules of evidence for labor arbitration hearings are not intended as a beginning-stage substitute for the adversary hearing desired by those parties who perceive that they have exhausted settlement efforts. Unlike mediation, with its always present possibility of termination without an agreement, the intended goal of the informal-mode arbitration format would remain that of terminating the dispute with a final and binding decision by the arbitrator. The proposed rules do not directly alter that objective. It is the hearing room atmosphere, fostered and encouraged by the proposed rules, that will in turn enhance settlement possibilities. The disadvantage of prolonged and numerous arguments over the admissibility of documents and testimony focuses attention on the admissibility dispute at the expense of a more penetrating focus on the ultimate issues.

Finally, the proposed rules are adaptable to the arbitration of disputes other than those between unions and employers. There is growing awareness of arbitration's potential as an alternative to judicial trials. Arbitration's advantages of speed and

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50. See Aaron, *supra* note 47, at 51 (comments by Andrea S. Christensen).

51. See *supra* note 12.

informality may also have the effect of reducing judicial caseloads.<sup>52</sup> The problem with substituting nonlabor arbitration for judicial trials will not be one of returning arbitration to its intended level of informality. Rather, the problem will be one of keeping new nonlabor arbitration forums from becoming what labor arbitration is today: an abused victim of incremental formalism.

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52. See Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239 (1987).

## APPENDIX

### PROPOSED RULES OF EVIDENCE FOR LABOR ARBITRATION HEARINGS

#### Rule One—*Presentation of Evidence*

(a) Both parties shall present to the arbitrator at the outset of the hearing an opening statement, outlining in summary form what each intends to prove.

(b) A party may call any witness it considers essential in proving its claim, in whatever order it desires, including a witness who would normally be called by the opposite party.

#### Rule Two—*Admissibility of Evidence*

(a) *Documentary Evidence*—Before testimony is presented, each party shall present to the arbitrator and to each other all documents it will rely upon during the presentation of its case. Each such document shall bear an exhibit number. Reference may be made to a document whenever a party chooses to do so during the hearing. No objection to a submitted document shall be allowed during the presentation of testimony. After both parties have presented their cases, including rebuttal, each may comment on the opposing party's documentary evidence. The comments should ordinarily be limited to matters of authenticity, relevance in light of the evidence as a whole, and other matters bearing on the impression the arbitrator should receive from the evidence.

(b) *Testimony*—All testimony shall be received without objection, except that either the arbitrator or a party may object to testimony that would (i) needlessly lengthen the time required to complete the hearing because of its lack of value to the arbitrator in resolving the issues presented by the grievance or (ii) violate the confidentiality of the husband-wife, priest-penitent, doctor-patient, or lawyer-client relationship, or the privilege against self-incrimination.

#### Rule Three—*Burden and Quantum of Proof*

(a) In all cases except grievances over the assignment of discipline, the party who filed the grievance shall proceed first and present its case. In grievances over discipline, the employer shall proceed first and present its case.

(b) The party first presenting its case shall have the burden of convincing the arbitrator that its position should be sustained.

